NOT FOR PUBLICATION-FOR PUBLICATION IN THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF ST. THOMAS AND ST. JOHN

DOMINO OIL, INC.,

Plaintiff,

v.

PHOENIX ASSURANCE CO. OF NEW YORK,

Defendant.

Defendant.

Case No. 96-99

Case No. 96-99

Defendant.

Defendant.

APPEARANCES:

Lee Rohn

St. Croix

For the plaintiff,

Stephen Brusch Henry Feuerzeig

St. Thomas

For the defendant.

MEMORANDUM

Moore, C.J.

Pending before the Court is plaintiff's motion to reconsider the dismissal of its second amended complaint. Plaintiff complains of three issues: the finding that New York has the more significant contacts, that New York law governs, and the dismissal itself. The motion is based on a claim of error of law.

First, plaintiffs challenge that this Court applied anything other than the Virgin Islands choice of law standards is misplaced. It was precisely the Court's application of the choice of law provisions of the situs of the Court which led it

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to the conclusion that New York's substantive law should apply. The Court correctly cited and relied upon the RESTATEMENT (SECOND) OF CONFLICTS § 188(2) to make this decision. However, plaintiff is correct in that application of section 193 puts further emphasis on the location of risk and swings the balance in favor of application of Virgin Islands law.

The St. Croix Division of this Court has dealt squarely with claims of bad faith. See Justin v. Guardian Insurance Co., 670 F. Supp. 614 (D.V.I. 1987). Judge O'Brien pointed out that two types of claims are available in cases involving settlement of insurance disputes, breach of contract or the "tort for failure to settle a claim in good faith." Id. at 616 (quoting Polito v. Continental Cas. Co., 689 F.2d 457, 461 (3d Cir. 1982). The parties are directed to Justin for the elements of the claim. Notably absent is the requirement of pleading "'fraud,' 'a high degree of moral turpitude, ' 'wanton dishonesty' and 'criminal indifference to civil obligation, 'which is 'aimed at the public generally.'" Rocanova v. Equitable Life Assurance, 612 N.Y.S.2d 339, 342 (N.Y. 1994). Indeed, a further review of the New York case law indicates that the Court conflated the requirements for pleading a claim for punitive damages in a bad faith refusal to settle with the requirements of the refusal to settle suit generally. Therefore, the dismissal of the plaintiffs complaint

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has been reconsidered and the motion to dismiss will be denied in part.

However, while the complaint survives the motion to dismiss generally, the punitive damages claim does not. Because of the submissions to the Court outside of the pleadings the Court can properly consider the motion to dismiss a motion for summary judgment and will do so for the limited purpose of the punitive damages claim. Plaintiffs have failed to show the required elements of a claim for punitive damages. For plaintiff to recover punitive damages, it must show that the insurer's acts were outrageous and done either with evil intent or reckless indifference. Restatement (Second) of Torts, § 908(2) (1967). The plaintiff cannot show such conduct. Therefore, under Virgin Islands law, the claim for punitive damages will be stricken. The same would be true were New York law to apply. Plaintiff's Mot. for Reconsideration at 23; Rocanova v. Equitable Life

Assurance, 612 N.Y.S.2d 339, 342 (N.Y. 1994).

ENTERED this _18th__ day of _August_, 1998.

For the Court

____/s/___ Thomas K. Moore Chief Judge

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For the reasons stated in the foregoing Memorandum, it is hereby

ORDERED that plaintiff's motion for reconsideration is GRANTED. The defendant's motion to dismiss is DENIED IN PART.

Namely, the claim for punitive damages is STRICKEN, but the bad faith refusal to settle claim itself survives the motion.

ENTERED this _18th__ day of August, 1998.

For the Court

__/s/___ Thomas K. Moore Chief Judge

ATTEST:
ORINN ARNOLD
Clerk of the Court

By: /s/
Deputy Clerk
cc: Hon. G.W. Barnard
Mrs. Jackson

Adam Farlow Ronald Belfon

Lee Rohn Stephen Brusch

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